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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 868

SCHERING CORPORATION, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 195–245) [1] is reported at 129 F. Supp. 879. The *per curiam* opinion of the United States Court of Appeals for the Third Circuit is reprinted in an appendix to the petition at pages 23–24. It is reported at 228 F. 2d 624.

[1] References designated as "R." are to the Joint Appendix in the court below, copies of which have been filed with this Court.

JURISDICTION

The judgment of the Court of Appeals was entered January 17, 1956 (Pet. 2). The petition for certiorari was filed April 16, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Attorney General was authorized by the Trading with the Enemy Act to "direct and compel" the petitioner corporation, all the stock of which had been vested under the Act as German-owned, to transfer patents to him and to enter into an Agreement subjecting other patents to public licensing.

2. Whether the petitioner, which was an "enemy" for purposes of the Act at the time the Attorney General compelled it to execute the Agreement, has standing now to attack the statute under which the Attorney General acted or the procedural correctness of the action he took.

3. Whether the petitioner may now have the Agreement set aside after the Attorney General has sold his stock in reliance thereon.

STATUTE AND ORDERS INVOLVED

The relevant provisions of Section 5 (b) of the Trading with the Enemy Act appear in the petition, pages 2–3. Executive Orders Nos. 8389 and 9193, both as amended, issued pursuant to the Act, are set forth in the record at pages 175–183 and 120–129, respectively.

STATEMENT

The Attorney General brought this action to enjoin violation of an Agreement entered into between his predecessor in office and the petitioner in January, 1952, and for a declaratory judgment that the Agreement was valid (R. 2–60). Under date of January 5, 1952, the then Attorney General, acting under the Trading with the Enemy Act and Executive Order No. 9193, as amended, had issued a Directive to the petitioner corporation and its directors, ordering the directors to authorize and the corporation to enter into the Agreement (R. 200–202a). They complied, and by the Agreement the petitioner assigned to the Attorney General certain patents and patent applications and agreed to license its other patents and applications on a reasonable royalty basis and to list them on the Register of Patents Available for Licensing and Sale (R. 5, 12–24, 35–36).

The abbreviated statement in the petition (pp. 3–4) gives only a bare outline of the facts on which this case depends. To place the action taken by the Attorney General and by the petitioner in perspective, we submit the following somewhat extended recital of the pertinent facts:

The petitioner is a New Jersey corporation, organized in December, 1935, to acquire the assets and business of a New York corporation of the same name, which was a wholly owned subsidiary

of Schering, A. G., a German corporation (R. 28). All its stock, except 3,150 shares of preferred, was owned by German stockholders (R. 78).

On April 18, 1942, the Alien Property Custodian vested all but six shares of the petitioner's common stock and 2,225 shares, or 42 per cent, of the preferred (R. 131–133).[2] Two days later the Custodian announced that his representatives were supervising the operations of the company (R. 113).[3] According to a stipulation of the parties, after the vesting the petitioner "conducted its business pursuant to documents issued from time to time by the Alien Property Custodian or the Attorney General as his successor" (R. 78),[4] and "such documents reflect actual supervision and control of and over Schering Corporation by the Custodian and his successor, as those terms are employed in common usage" (R. 81). A typical "Authorization", dated December 23, 1947, authorized transactions "necessary to the normal conduct of the business", but stated that specific authorization would be necessary for a number of matters, and required the submission

[2] Only the common stock had voting rights (R. 48).

[3] The Attorney General succeeded to the functions and authority of the Alien Property Custodian on October 15, 1946 (Executive Order No. 9788, 11 F. R. 11981).

[4] Before the vesting and shortly after Pearl Harbor, the Treasury Department had placed supervisory representatives and guards in petitioner's plant (R. 112, 114), and on January 29, 1942, that Department announced that it had suspended the then President of Schering and seven other officials and barred them from the premises (R. 110).

of reports, copies of minutes of stockholders and directors' meetings, and, with ten days' advance notice, of notice of directors' meetings and the agenda therefor (R. 88–93).

On July 10, 1944, the Custodian issued General Order No. 31 (R. 172–174, 9 F. R. 7739) by which he prohibted all transactions by any business enterprise in which he had vested interests, except as authorized by him or his agent or delegate or by a supervisor designated by him. Some two years later—on findings that he had vested all 44,000 shares of the common stock[5] and 2,225 shares of the preferred and had assumed supervision, jurisdiction, and control of the corporation pursuant to the vesting orders and by virtue of General Order No. 31, that the petitioner was engaged in the manufacture of "drugs and biologicals of vital importance to public health and the medical branches of the armed forces", and was an important corporation in a field closely related to the defense economy—the Cus-

[5] On September 2, 1942 (Vesting Order No. 139, R. 142–144), the Custodian had vested one additional share of common and on March 16, 1944 (Vesting Order No. 3328, R. 139–141), he vested the last five outstanding shares of common. These vesting orders determined that the corporation was a national of a designated enemy country (Germany) and contained findings that "to the extent that any or all of such nationals are persons not within a designated enemy country the national interest of the United States requires that such persons be treated as nationals of such designated enemy country".

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todian designated Schering as a "key corporation" within the meaning of § 503.9 of the Regulations of the Office of Alien Property Custodian (R. 86–87),[6] which restricts the ownership of stock of "key corporations" to "American nationals" as defined therein. See R. 48–52. This was followed in 1949 by Special Order No. 28 by which the Attorney General, as successor to the Custodian, directed the corporation to amend its Certificate of Incorporation to provide that only American nationals could hold its stock. The corporation complied (R. 49).

In April 1949, the Attorney General, by directive, ordered the petitioner to license the patents it held as of December 31, 1948, to all qualified applicants.[7] The directive referred to the vesting orders covering the stock and determined that "in the administration of the property so vested and transferred * * * it is in the interest of and for the benefit of the United States" that the patents be licensed (R. 98–102). The petitioner obeyed the directive and granted a number of licenses in 1949, 1950, and 1951 (R. 34).

Either in late 1947 or early 1948 the Attorney General advised the corporation that he was

[6] § 503.9 is now § 505.10 of Title 8 of the Code of Federal Regulations (1952 revision).

[7] Including patents issued thereafter on applications filed before that date. Royalties were to be agreed upon by the parties, and in default of agreement would be determined by the Office of Alien Property.

planning to sell the vested stock (R. 102–103, 67).[8] As a preliminary to the sale of the vested stock, the Attorney General, on January 5, 1952, issued the Directive which led to the Agreement which is the subject of this action (R. 45, 66–68). It was addressed to the corporation and to its "Board of Directors, collectively and individually" (R. 200) and, after reciting the vesting orders and the Attorney General's ownership of the outstanding stock,[9] it stated that Schering Corporation was subject to the supervision, jurisdiction and control of the Attorney General under the Trading with the Enemy Act and that:

> In the exercise of the authority and functions vested in or delegated to the Attorney General under the Trading with the Enemy Act, as amended, and in the administration of the property and interests vested in him as aforesaid, the Attorney General, after investigation, has determined it to be in the interest of and for the benefit of the

[8] The preferred stock was retired in 1949. At the same time the common stock held by the Attorney General was split ten for one, giving 440,000 shares (R. 30).

[9] In addition to the vesting of the stock, the Custodian had on July 30, 1942, vested one patent application standing in petitioner's name (R. 14), and on January 15, 1952, the Attorney General vested any rights and interests of Schering, A. G., in the goodwill of petitioner's business and in its trademarks and trade names. Those rights he assigned to the petitioner for the sum of $10 (R. 34). Also, on August 25, 1947, the Attorney General had vested (Vesting Order No. 9704, 12 F. R. 6224) all interest and right created in Schering, A. G., by five agreements with the petitioner.

United States that (1) the patents and patent application in said Exhibit A [10] be transferred to, or retained by, the Attorney General to be administered in accordance with policies or procedures generally applicable to other patents held by him pursuant to the Trading with the Enemy Act, and (2) the patents listed in Schedule 1 of said Exhibit B and any patents hereafter issued on the patent applications listed in Schedule 2 of said Exhibit B [11] be made available by Schering for licensing to qualified applicants on a non-discriminatory, non-exclusive, reasonable-royalty basis. * * * The aforesaid determination may appropriately be accomplished by the execution and performance of an Agreement, substantially in the form of the attached Agreement by Schering Corporation and the Attorney General.

Pursuant to the Directive, the Board of Directors adopted a resolution authorizing the execution of the Agreement (R. 77), and it was sub-

[10] Exhibit A covered the patents and applications originating prior to April 18, 1942, the date of the first vesting order relating to Schering stock. This was called the period of "German control" (R. 35), and those patents and applications were termed the "old" patents. By Vesting Order No. 18685, also dated January 5, 1952 (R. 136–139), the Attorney General vested "all right, title and interest and claim" of Schering, A. G., in the "old" patents. As part of the Agreement entered into pursuant to the Directive, the Attorney General granted the petitioner an irrevocable, non-exclusive, royalty free license under these patents (R. 59).

[11] Exhibit B covered the patents and applications issued or filed on or after April 18, 1942, and before January 1, 1952—termed the "new" patents (R. 35–36).

sequently executed on January 17 and 18, 1952, effective as of January 1, 1952 (R. 4). Petitioner's President executed the Agreement on its behalf as the "free and voluntary act and deed of said corporation by virtue of authority from its Board of Directors" (R. 23), and the Director of the Office of Alien Property executed it on behalf of the Attorney General (R. 24).

By the Agreement, the petitioner transferred to the Attorney General the patents and applications originating during the period of "German control" (fn. 10, *supra,* p. 8) (R. 17). All royalties accruing after the effective date of the Agreement under previously issued licenses on these patents were also transferred to the Attorney General (R. 17). As to the remainder of its patents and patent applications (up to January 1, 1952), the corporation entered into an "irrevocable commitment" (R. 35–36, also R. 19, 20) to issue non-exclusive licenses to qualified applicants for reasonable royalties and to list them within 75 days on the Register of Patents Available for Licensing and Sale in the Patent Office. It was agreed that any patents issued on applications retained by Schering would be so listed within 30 days after issuance (R. 21). On the patents transferred to him the Attorney General granted the petitioner a non-exclusive, irrevocable, non-assignable, royalty-free license (R. 19). The Agreement was effective as of January 1, 1952, and was to continue until all patents and appli-

cations retained by the corporation had expired or been abandoned and denied (R. 22).

Immediately after the execution of the Agreement the Attorney General proceeded with the sale of the Schering stock. On January 18, 1952, by Special Order No. 31 he authorized and directed the petitioner, its officers and directors, to take all steps necessary and appropriate for the filing with the Securities and Exchange Commission of a registration statement and of a prospectus to be issued on behalf of the Attorney General (R. 73–76). The statement and prospectus were duly filed. The officers and directors of the corporation certified that (R. 105):

> * * * all statements contained in said Registration Statement are true and no material fact known to them which is required to be stated therein or which is necessary to make the statements therein not misleading, has been omitted.

Notice was given of the obligations imposed on the corporation by the Agreement with the Attorney General and its possible effect upon the business, in this language (R. 34–36):

> On January 5, 1952, the Attorney General issued a directive under the Trading with the Enemy Act, as amended, determining it to be in the interest of and for the benefit of the United States (1) that all of the Corporation's patents and patent applications originating during the period of German control of the Corporation, that

is prior to April 18, 1942, be transferred to or retained by the Attorney General to be administered in accordance with policies or procedures generally applicable to other patents held by him pursuant to the Trading with the Enemy Act, under which royalty-free revocable licenses are presently issued to any qualified applicant, and (2) that all other patents heretofore or hereafter issued on patent applications filed on or after April 18, 1942 and before January 1, 1952 be made available by the Corporation for licensing to any qualified applicants on a non-discriminatory, non-exclusive, reasonable royalty basis, and requiring the Corporation to enter into an agreement to carry out the purposes of the policy above set forth. The agreement hereinafter referred to has been executed by the Corporation, effective as of January 1, 1952, in compliance with such directive.

By the terms of said agreement the Corporation has transferred and assigned to the Attorney General all United States Patents owned by it which were issued upon appliications filed prior to April 18, 1942. * * *

The Corporation's remaining patents, that is, those issued upon applications filed on or after April 18, 1942 and before January 1, 1952, are made subject to an irrevocable commitment on the part of the Corporation to license them on a reasonable royalty basis to any qualified applicant * * *.

In the prospectus no value was placed on the corporation's patent rights (R. 56–57). The prospectus stated that the corporation's management believed that the Agreement "* * * will have an adverse effect upon its future sales and profits which may very well be material" (R. 36).

On March 13, 1952, the Attorney General sold his stock in petitioner to a group of investment bankers who re-sold the stock to the public (R. 3, 80).

After the sale, petitioner refused to perform its obligations under the Agreement (R. 80). In this action brought by the respondent to enforce the Agreement, the petitioner alleged that it entered into the Agreement under duress, that the Act did not authorize the Attorney General to require the execution of the Agreement, that it was not the act of the petitioner, and lacked consideration. By way of counterclaim the petitioner asked for rescission (R. 60–73).

The parties stipulated that the petitioner denied the validity of the Agreement and had not licensed its patents or listed them for licensing (R. 82–83). It was also stipulated that the Government exercised compulsion, including fear of imprisonment, on the petitioner's directors and officers to have them authorize and execute the Agreement; that the officers and directors understood the instruments they executed and the acts

called for by such instruments; but that they did not execute or authorize the instruments of their own free will and in the exercise of their discretion (R. 77).

On motion to dismiss the counterclaim, the District Court held the Agreement lawful and binding (R. 195–245) and dismissed the counterclaim (R. 246). By a pretrial order the parties agreed to submit the case for decision on the pleadings and the stipulations (R. 83–84). On July 8, 1955, the District Court entered a final order declaring the Agreement valid and enforceable and enjoining violations thereof (R. 246–248).

On appeal, the Court of Appeals, *per curiam*, affirmed on January 17, 1956, the opinion of the District Court. 228 F. 2d 624; Pet. App., 23–24.

ARGUMENT

The Directive by which the Attorney General compelled the execution by petitioner of the Agreement was within the powers of the Attorney General under the Trading with the Enemy Act and was a proper exercise of those powers "in the interest of and for the benefit of the United States" (R. 201). It follows that the Agreement was valid and binding upon petitioner; moreover, petitioner has no standing to attack the Agreement.

1. THE DIRECTIVE WAS A VALID EXERCISE OF THE AUTHORITY UNDER SECTION 5 (B) OF THE TRADING WITH THE ENEMY ACT TO "DIRECT AND COMPEL" A TRANSFER OF FOREIGN (AND ENEMY) PROPERTY AND TO REGULATE THE HOLDING AND USE OF SUCH PROPERTY.

As of January 1952, when the Attorney General issued the Directive and the Agreement was executed, the petitioner was an "enemy" within Section 2 of the Act, as amended in 1941 by the First War Powers Act, because until April 18, 1942, all of petitioner's stock, except for 3,150 shares of preferred, was German-owned. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480; *Uebersee Finanz-Korp.* v. *McGrath*, 343 U. S. 205. For the same reason petitioner was also a "foreign national" within Section 5 (b) of the Act and Executive Order No. 8389, as amended (R. 175–183). The petitioner continued to be an "enemy" for purposes of the Act and its assets continued to be enemy property after the vesting of the shares. *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42. In 1949, the preferred stock was retired (R. 30), so that in January 1952, all the outstanding stock was the "enemy" shares held by the Attorney General, and, except for the interest of the United States, there was no non-enemy interest in the corporation or its assets.[12] What the Directive

[12] Petitioner could also still be treated as a "national" of Germany because "on or since" June 14, 1941, a substantial part of its stock was German-owned. Executive Order No. 8389, as amended (R. 175–183, at 180).

dealt with was wholly enemy (and foreign) property.

a. Section 5 (b) authorized the President or his delegate to "* * * regulate, direct and compel * * *" any use of or rights in "any property in which any foreign country or a national thereof has any interest" (Pet. 2–3). By Executive Order No. 9193, issued under Section 5 (b), the President delegated to the Alien Property Custodian (whose successor is the Attorney General) authority to "take such action as he deems necessary in the national interest, including, but not limited to, the power to direct, manage, supervise, control or vest" patents in which a foreign "national" had any interest (R. 120–129).

The Directive was clearly within the statutory authority to "regulate, direct and compel", and the Executive Order plainly comprehended the power to direct a transfer to the Attorney General of petitioner's "old" patents and to compel it to hold its "new" patents on the condition of licensing them to all qualified applicants on a reasonable royalty basis.[13] Petitioner was a foreign "national" for purposes of the Executive Order because of the German ownership of its stock on June 14, 1941. To render a corporation a foreign national no administrative finding

[13] The last also came within the authority under Section 5 (b) to "regulate" the exercise of "any right, power or privilege".

is necessary; the fact of foreign stock ownership is enough. Executive Order No. 8389, as amended, Section 5E (ii) (R. 180). And under Executive Order No. 9193, Section 2 (d) (R. 122), the Attorney General could "regulate, direct and compel" the transfer and use of the patents of a foreign national without making any findings under Section 10 (a) (R. 126–127) of that Order as to whether the corporation was also a "national of a designated enemy country".

In addition, the direction of the assignment and licensing of the patents was proper as a step in the administration of the vested shares of stock and a *pro tanto* liquidation of the values which those shares represented. The Attorney General was the sole stockholder, and under Section 5 (b) (Pet. 2–3) his duty was to administer, liquidate, and deal with the vested property "in the interest of and for the benefit of the United States".[14]

[14] Petitioner argues (pp. 10–11) that the Act did not authorize the Custodian to compel enemies to make gifts of their property to private individuals. But in *United States* v. *Chemical Foundation*, 272 U. S. 1, this Court sustained the validity of similar action by the World War I Custodian with respect to enemy patents. And, in the District Court, petitioner admitted that the purpose of the Directive and the Agreement was "in accord with the settled policy of the Government for the benefit of this country and its citizens, and thus to be valid" (R. 198); also, "Schering admits that it was in the interest and for the benefit of the United States to have Schering's patents used for the benefit of this Government and of its qualified citizenry generally" (R. 213).

b. As against this, petitioner urges (Pet. 12) that the Act does not authorize the Alien Property Custodian to take property by what it terms the "supervisory power", and that he may do so only by a vesting order because the power to "direct and compel" the transfer of property in which a foreign national has "any interest" might also affect American interests in the property. But, even assuming that the Attorney General, as successor to the Custodian, could not properly "direct and compel" a transfer of property in which the foreign interest was only partial, it does not follow at all that he could not do so in a case where the property in question was not only entirely foreign-owned, but was also enemy-owned; nor does it follow, in any event, that the *enemy* could challenge the Attorney General's action even if it were unauthorized.

This fact that, as of January, 1952, petitioner was an enemy within the Act vitiates its whole attack on the Directive. In the cases on which petitioner relies to support its asserted requirement of "jurisdictional findings", like *Mahler* v. *Eby*, 264 U. S. 32, and *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the party aggrieved by the administrative order was not an enemy and was within the full protection of the due process and just compensation clauses of the Fifth Amendment, as well as the statutory provisions made for his protection. Petitioner, however, was an enemy within the Act, and this Court has repeatedly

held that with the property of an enemy the United States may deal as it sees fit; it may seize the property, appropriate it, or confiscate it. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 120–121; *Silesian-American Corporation* v. *Clark,* 332 U. S. 469, 475; *Miller* v. *United States,* 11 Wall. 268, 305–306.

Whatever limitations Congress or the President may have placed on the Attorney General's dealing with enemy property were therefore not for the enemy's benefit but for the benefit of the general American public or of individual citizens. Accordingly, the *enemy* has no standing to complain if the Custodian has failed to abide by the statutory limitations. It follows that in January, 1952, petitioner did *not* have, as against the Attorney General, that "legally protected" interest which is the necessary basis for an attack in the courts on the validity or propriety of administrative action. See, *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125. And if the Directive invaded no "rights" which petitioner had, as of January, 1952, against the Attorney General, it may not now retroactively make the Directive into a "wrong".

Likewise, having been an enemy in January 1952, petitioner may not now invoke the rights of non-enemies, a class to which it did not belong when the Attorney General issued the Directive.

Lee v. *State of New Jersey,* 207 U. S. 67, 70; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440; *Bourjois, Inc.* v. *Chapman,* 301 U. S. 183, 190. Similarly, it may not attack the Directive on the basis that the application of the "supervisory power" to property interests of American, or of "freezing" controls, might be unconstitutional. No such question arises here, and the Court will not invalidate the Act because on other facts its application might have been unconstitutional. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 461; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 479.

c. Even passing the point of standing, petitioner's attack on the procedure followed by the Attorney General is without merit. Nothing in the Act requires that the Attorney General use one particular set of words or one particular form of order when dealing with property which is admittedly "enemy". *Isenberg* v. *Sherman,* 212 Cal. 454, 298 Pac. 1004, 1023, certiorari denied, 286 U. S. 547; *In re Yokohama Specie Bank,* 188 Misc. 137, 66 N. Y. S. 2d 289, 293. The District Court correctly held (R. 229–240) that, if findings were necessary, the Directive did contain those findings and that reference could be made to the findings in the vesting orders mentioned in the Directive. See *Colorado Interstate Gas Co.* v. *Federal Power Comm'n,* 324 U. S. 581, 595; *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 228; *Securities and Exchange Commission* v.

Chenery Corp., 332 U. S. 194, 196; *Eastern-Central Ass'n* v. *United States*, 321 U. S. 194, 211.

Petitioner is also in error in asserting (Pet. 14) that *all* transfers of title and possession to the Custodian have been affected by vesting orders. In a sizable number of cases the transfer has been accomplished by a "turn-over directive", which has the effect of a "*res* vesting". *Zittman* v. *McGrath*, 341 U. S. 446, 464. See, for example, *Zittman* v. *McGrath*, 341 U. S. 471; *In re Yokohama Specie Bank*, 188 Misc. 137, 66 N. Y. S. 2d 289; *In re Daly's Estate*, 189 Misc. 680, 74 N. Y. S. 2d 711; *In re Young's Estate*, 204 Misc. 92, 118 N. Y. S. 2d 803. The compelling of a transfer to the Custodian by means of such a directive has been approved by this Court. *Zittman* v. *McGrath*, 341 U. S. 471; *Brownell* v. *Singer*, 347 U. S. 403.

The same procedure was followed in the instant case. By Vesting Order No. 18685 (R. 136–139) the Attorney General vested "All right, title and interest and claim" of the petitioner's parent corporation, Schering, A. G., of Germany, in, to, and under the "old" patents (R. 136–139). Then, contrary to the statement in the petition (Pet. 15, n. 14), in a directive specifically referring to Vesting Order No. 18685 (R. 200a), the Attorney General ordered the petitioner to execute the Agreement which assigned to him the "old" patents (R. 201, 17).

2. THERE IS NO LACK OF REMEDY FOR A PROPER PARTY TO CHALLENGE ILLEGAL OR UNCONSTITUTIONAL EXERCISE OF THE AUTHORITY TO "DIRECT AND COMPEL".

Although the petitioner states (Pet. 11) that it "reserves" the question whether under New Jersey law the Attorney General as the sole stockholder could constrain the authorization of the Agreement by the Corporation's directors,[15] it does argue at length (Pet. 16–21) that the "supervisory clause"—that is, the part of Section 5 (b) which empowers the Attorney General to "direct and compel"—is unconstitutional because it provides no remedy. According to petitioner (Pet. 18), the directors of petitioner had a "fundamental right to act in accordance with their conscience and judgment," and the Directive was an infringement of that right.

As to the constrained transfer of the "old" patents, it is clear that there was a sufficient constitutional remedy under Section 9 (a) of the Act, and that if the directors had desired to attack that feature of the Directive and the Agreement and to question whether the corporation was in fact an enemy, they could have brought suit under that Section. *Stoehr* v. *Wallace,* 255 U. S. 239; *Becker Co.* v. *Cummings,* 296

[15] The District Court held that the sole stockholder could constrain the action of the directors under New Jersey law (R. 205–210), and the Court of Appeals did not disagree, although it did not find it necessary to adopt that holding (Pet. App. 24).

U. S. 74; *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480. Section 9 (a) applies to all property "transferred" to the Custodian and "held" by him.

As to the direction to enter into the Agreement to license the "new" patents, the rights of the directors, as representatives and fiduciaries, could, of course, rise no higher than those of the corporation. See, *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 853 (C. A. 2), certiorari denied, 269 U. S. 583; *Cordero* v. *Brownell*, 111 F. Supp. 556, 558 (S. D. N. Y.), affirmed, 211 F. 2d 90 (C. A. 2); *Keppelmann* v. *Palmer*, 91 N. J. Eq. 67, 108 Atl. 432, certiorari denied, 252 U. S. 581. Since the corporation (as an enemy) had to obey, and since Congress can validly withhold remedies from an enemy (*supra*, pp. 17–18), the directors could not decline, on grounds of "conscience and judgment", to comply with the Directive; nor need judicial remedies be available to them. Obviously, to "direct and compel" corporate action by an enemy corporation the Attorney General must have the authority to override the discretion of directors.

Petitioner conjures up the specter of the unlimited and unreviewable "freezing" or "blocking" of American or non-enemy property (Pet. 17). As we have pointed out, there is no such question in this case, but in any event it seems clear that if the directors wanted to question the order to license the "new" patents, either on the

ground that petitioner was not an enemy, or even that the Directive infringed a "fundamental" right of theirs, they had open to them the classic remedy of a suit for an injunction, which would restrain action by the Attorney General in excess of his statutory authority or under an unconstitutional statute. See, *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619, 621; *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682, and cases cited; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.[16]

3. AS A MATTER OF EQUITY, THE COURTS BELOW PROPERLY ENFORCED THE AGREEMENT.

Interwoven with petitioner's arguments on statutory construction and constitutionality is a suggestion that in some way the result of enforcing the Agreement "procured under duress." (Pet. 9)[17] will be to victimize the "American purchasers" of the vested stock from the Attorney General. See also the petition at pp. 20–21.

We have stated, *supra,* pp. 6–7, 10–12, in detail

[16] Petitioner cites *Codray* v. *Brownell,* 207 F. 2d 610 (C. A. D. C.), certiorari denied, 347 U. S. 903, for the proposition that an "individual" suit against an official to "unblock" assets will not lie (Pet. 17 n.). But in *Codray* the original "blocking" of assets was admittedly lawful; there was no question as to the authority of the Attorney General to "block" the assets under Section 5 (b).

[17] Except for this one use of the word, the petition does not argue duress. It is clear that, the action of the Attorney General being authorized by law, there was no duress. Restatement, *Contracts* (1939), § 492.

the facts as to the sale of the vested shares by the Attorney General. In brief, they are that the Agreement was an integral part of the Attorney General's over-all plan for returning the corporation to private ownership by selling the vested shares (R. 67–69, 102, 103). Accordingly, he caused the filing with the Securities and Exchange Commission of a prospectus (R. 24–60) which described the Agreement in detail and stated the opinion of the management that the effect upon the corporation's future sales and profits would be adverse (R. 36, 60). Then he sold the vested shares to a syndicate of investment bankers who thereafter sold to the public (R. 80).

Whatever the purchasers from the brokers knew about the stock they bought, there can be no claim that the brokers who bought from the Attorney General were not familiar with the prospectus and the statements therein about the Agreement.[18] What they bought from the Attorney General was stock in a corporation which had assigned some of its patents and agreed to license the others at reasonable royalties, and that was what they sold to the public.[19]

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[18] The prospectus stated that the "old" patents had been assigned and that there was "an irrevocable commitment" to license the "new" patents (R. 35–36).

[19] The petition quotes (Pet. 9–10) from the Government's brief in the Court of Appeals a portion of a sentence speaking

Since the Agreement was a condition of the sale of the stock by the Attorney General, it will be enforced because "injustice can be avoided only by enforcement of the promise". Restatement, *Contracts*, § 90. And, there being no prejudice to the rights of third parties as of its date, the corporation is bound by the Agreement executed at the behest of its sole stockholder. *Renault* v. *L. N. Renault & Sons*, 188 F. 2d 317, 330 (C. A. 3); *Murtland Holding Co.* v. *Egg Harbor Commercial Bank*, 123 N. J. Eq. 117, 196 Atl. 230, 234. There is no injustice to the present stockholders of petitioner, for they bought their stock subject to the burden of the Agreement. See *Buffum* v. *Barceloux Co.*, 289 U. S. 227, 234; *Application of Mazzone*, 281 N. Y. 139, 22 N. E. 2d 315, 319. Their rights in the corporation cannot rise above those of the brokers from whom they purchased. *Erickson-Hellekson-Vye Co.* v. *A. Wells Co.*, 217 Minn. 361, 15 N. W. 2d 162, 172, citing 1 Morawetz, *Private Corporations (2d ed.)*, § 1. And cf. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 502; *Fahey* v. *Mallonee*, 332 U. S. 245, 255. Otherwise, they would receive a windfall in the form of patent rights they did not purchase.

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of "the third parties into whose hands the stock passes." In context, the words "third parties" referred to the brokers who bought from the Attorney General. See *In re H. Hicks & Son*, 82 F. 2d 277, 279 (C. A. 2).

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 868

SCHERING CORPORATION, *Petitioner*

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian.

REPLY BRIEF FOR PETITIONER

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In The

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No. 868

Schering Corporation, *Petitioner*

v.

Herbert Brownell, Jr., Attorney General of the United States, as Successor to the Alien Property Custodian.

REPLY BRIEF FOR PETITIONER

A reply brief is made necessary by arguments which respondent now advances for the first time. We remind the Court that respondent sued for specific performance; and the defense is illegal compulsion which made the agreement void for duress.

I

The Directive Is Void for Lack of Jurisdictional Findings

1) Respondent urges that an "enemy" is not entitled to "jurisdictional findings" under the rule of *Mahler* v. *Eby*, 264 U.S. 32, because it is not entitled to due process and just compensation. Brief in Opposition (hereinafter Br. Opp.) p. 17. The requirement of findings does not, however, rest on due process but on the fact that there is an exercise of "delegated legislative power", *Mahler* v. *Eby*, 264 U.S. 32, 44, being aimed to preclude "unfettered discretion", *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 431. Not yet have "enemies" resident in these United States been handed over to the "unfettered discretion" of administrators. Cf. our Petition (hereinafter Pet.) 20. That way lies the road to charnel houses.

2) For the first time respondent now argues that Schering was a "foreign", as well as "enemy", national and that no findings were necessary with respect to a "foreign" national, citing Section 5E(ii) of Executive

Order 8389 (Br. Opp. 15-16). That section in pertinent part defines "national" to include a corporation which has been "controlled by", or the securities of which have been "owned or controlled by", a "foreign national" (App. 180a). Since jurisdiction is limited to such persons, findings responsive to the jurisdictional limitations are manifestly required. No such findings are contained in the Directive (App. 200a).[1]

True, sections 2(a) and 2(b) of Executive Order 9193 set up two categories of "business enterprises"—"enemy" and "foreign" national (App. 121a)—but, section 10 (App. 126a) lays down that

> "The term 'national' shall have the meaning prescribed in section 5 of Executive Order No. 8389, as amended, *provided, however,* that persons not within designated enemy countries * * * shall not be deemed to be a national of a designated enemy country unless the Alien Property Custodian determines" (italics in the original)

certain things. If the limitations so imposed by section 10 might be disregarded on the ground that an "enemy" national was also a "foreign" national, they would be nullified. That the section 10 limitations govern a "foreign" national which is also an "enemy" national was repeatedly recognized by respondent and his predecessors in dealing with Schering itself; for, as respondent himself states, the

> "vesting orders determined that the corporation was a national of a designated enemy country (Germany) and contained findings that 'to the extent that any or all of such nationals are not persons within a

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[1] Note too that section 2(b) of "9193" authorizes the Custodian to deal with a "business enterprise" which is a "foreign" national only

> "when it is determined by the Custodian and he has certified to the Secretary of the Treasury that it is necessary in the national interest * * *"

to take described action (App. 121a). There is no such determination or certificate.

designated enemy country the national interest of the United States requires that such persons be treated as nationals of such designated enemy country'." (Br. Opp. 5, fn. 5).

It is the absence of precisely this finding which vitiates the Directive that issued under the quite different "supervisory" power.

3) For the first time, also, respondent now argues that he could have taken the patents of Schering as a "foreign" national under Par. 2(d) of "9193" without making the jurisdictional findings required by section 10(a) (Br. Opp. 16). But the findings required even in the case of a "foreign national" (supra, p. 2) were not made in the Directive. Moreover, the "property" of an enemy "business enterprise" is governed by section 10(a). That such "property" includes "patents" is confirmed in this case by respondent's own Vesting Order 18685 (App. 136a), where, seeking to cut off the remote possible "interest" of German Schering in petitioner's patents, he vests this interest as "property" of an "enemy" national and makes the very findings which are fatally lacking in the Directive (App. 138a).

4) Defendant urges that "reference could be made to the findings in the vesting orders mentioned in the Directive" (Br. Opp. 19). There was no incorporation by reference of the vesting order findings, merely a mention of the vesting orders themselves (Pet. 6). The cases cited by respondent are of no avail. *Colorado Interstate Gas Co.* v. *Federal Power Comm.*, 324 U.S. 581, was not a case of *absent* findings. Findings had been made; the question was whether they were adequate. The Court held that the findings were not too "vague and obscure". Id at 595. It is one thing to construe an "obscure" finding and, as is shown by *Mahler* v. *Eby* (Pet. 6), something else again to *supply* a missing finding.[2]

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[2] Similarly, in *Alabama Great S.R. Co.* v. *United States*, 340 U.S. 216, the Court said that the Commission is not required "to

II

Respondent Was Not Empowered To Direct an Enemy National To License Its Patents to Private Individuals

To this argument (Pet. 10-11) respondent replies that in *"United States* v. *Chemical Foundation*, 272 U.S. 1, this Court sustained the validity of *similar action* by the World War I Custodian with respect to enemy patents." (Br. Opp. 16, fn. 14) (italics supplied throughout). There the patents had first been "seized", i.e. vested, by the Custodian and it was conceded that "they were lawfully taken over." 272 U.S. at 9. All that was in issue was the legality of the Custodian's sale *after* the seizure. Here respondent did not vest and make a public sale of the patents; he issued a Directive to petitioner under the "supervisory" power to license them to strangers.[3] That difference is central to our case.

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make detailed findings of fact." But this "does not relieve the Commission of the duty to make the 'basic' or 'quasi-jurisdictional' findings essential to the statutory validity of an order." The latter findings had there been made. Id. at 227-228.

[3] The sordid possibilities of the power here claimed by respondent are underscored by the unsavory facts of the *Chemical Foundation* case. While Director of a branch of the Alien Property Custodian, Garvan and his associates conferred with American industry representatives to arrange to seize and sell the German patents. Later, Garvan, then Custodian, acted for the United States in making the transfers to the Chemical Foundation of which he was the President, and his associates became General Counsel and Patent Attorney for the Foundation. These facts led Attorney General Stone to bring suit to set aside the sale on ground of fraud. Those charges were not examined by this Court because the lower courts had concurred in finding that the United States failed to establish fraud and conspiracy, 272 U.S. at pp. 17, 14. Consider how such possibilities would be heightened if the Custodian could dispense with vesting and public sale and could merely direct an enemy to deliver his patents or other property to individual Americans, especially since no remedy whatsoever exists to challenge the latter action. (Pet. 18-20).

III

Respondent Was Not Authorized To Take Property by Exercise of the Supervisory Power

1) Respondent wraps himself in the literal terms of the statute (Br. Opp. 15) and makes no reply to our demonstration that a literal reading of "compel a transfer" nullifies the statutory limitation of vesting to enemy property, thwarts the intention of Congress to exempt Americans from a taking and runs counter to the unvarying administrative practice of taking enemy property by "vesting", not by "supervisory", order (Pet. 12-15). He assumes that he cannot "compel a transfer" of property in which American interests are intermixed but argues that it suffices that entirely enemy-owned property may be so taken (Br. Opp. 17). This begs the question, which is not one of constitutional power to "confiscate" enemy property (Br. Opp. 18) but of statutory authority to take by "supervisory" rather than "vesting" order. We have shown (Pet. 12-16) that the statute cannot be construed to authorize the taking of *any* property by supervisory order.

2) Respondent urges that at the time the Directive issued petitioner was an enemy,[4] that no "enemy could challenge the Attorney General's action even if it were unauthorized", and that petitioner stands no higher now than it did then (Br. Opp. 17-18). The law goes no further than this: the United States may seize and confiscate

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[4] Respondent goes even further, saying that

"Petitioner could also *still* be treated as a 'national' of Germany because 'on or since' June 14, 1941, a substantial part of its stock was German-owned * * *" (Br. Opp. 14, fn. 12).

In other words, the 100% American puchasers of shares from him are exposed to the perpetual risk that the corporate assets may be vested or "frozen" on the ground that the corporation remains an enemy. Congress contemplated no such irrational perpetuation of wartime controls; it did not, indeed it could not, leave American investors who bought from respondent forever at his mercy. From the outset Congress was assured that Americans were untouched by the Act (Pet. Appendix B).

enemy property and no enemy may *bring* suit under §9 of the Act to recover it. But this is not a suit *by* an enemy; it is a suit by respondent for specific performance *against* an "enemy". An enemy is expressly authorized to *defend* and in defending to set up the lawlessness of official action (Pet. 20). The Act did not deliver enemies to the "unfettered discretion" of administrators. To the contrary,

> "the Trading with the Enemy Act was never intended, without Presidential proclamation [here absent] to affect resident aliens at all." *Ex parte Kumezo Kawato*, 317 U.S. 69, 76.

3) Next respondent argues that petitioner seeks to have the Court declare the "supervisory" power unconstitutional in the interest of an absent class, Americans whose property may not be taken (Br. Opp. 18-19). Not at all. The scope of the supervisory power presents a question of *construction* of §5(b)—whether property may be taken under the supervisory power. In construing a statute courts often consider whether a given interpretation will conduce to unreasonable results (cf. *United States* v. *Ryan*, 284 U.S. 167, 175) or will thwart the legislative intention. For example, here the Court will note that the power to take enemy property is already conferred by the vesting clause; it may then ask whether it should read a superfluous duplication of that power into the supervisory clause when to do so will both lead to unreasonable results—the taking of American interests—and balk the Congressional intention to protect Americans from such action.

4) All respondent's talk that petitioner was an enemy at the time of the Directive obscures the fact that respondent was then the sole shareholder and that the American purchasers from him are now the real parties in interest. If he chooses to identify the corporation with himself, there was no contract for he could not contract with himself. *Re H. Hicks & Son*, 82 F. (2d) 277, 279. If he insists on the separate entity, then he was under a

duty to comply with New Jersey corporate law and federal law, particularly because he issued the Directive in contemplation of a sale of his shares to the American public. (Br. Opp. 7, 24). Instead, relying on what the Securities & Exchange Commission has termed "the perennial faith, trust and innocence of investors",[5] respondent first illegally coerced the directors to give the patents to him and to bind the future shareholders down the years, and then unloaded the corporation thus shorn of its patents on an unsuspecting public. Now he would bar the American shareholders who bought from him from making the defense that his action was unauthorized by statute. It bears repeating that he himself said that

> "when the contract is entered into with a corporation with a view to a contemplated sale of its stock, the interests of the corporation may be *measured after* the sale *by the interests of the third parties* into whose hands the stock passes." (Pet. 9-10)[6]

The Directive and Agreement were designed to bind those "third parties" down the years and it would be a reproach to the law if they could not be heard to defend against official lawlessness aimed directly at them. No such result is required by statute or cases.

5) Respondent would transmute our demonstration that the statute bars a taking by supervisory order into insistence that the "Attorney General use one particular set of words or one particular form of order * * *" (Br. Opp. 19). But it was respondent and his predecessors who themselves blazed the trail. For ten years, more than 14,000 transfers of title and possession were accomplished by vesting orders, never by supervisory order or direc-

[5] *8 SEC Protective Comm. Study*, 289 (1940).

[6] Respondent now would soften the impact of this concession by confining the "third parties" to "the brokers who bought from the Attorney General" (Br. Opp. 24-25, fn. 19). But his brief in the court below (p. 37) urged that the Agreement bound the "new or subsequent stockholders"; and it was known to all that the brokers were, as usual, merely a conduit for immediate distribution to the public.

tive. In the vesting orders the administrators employed words drawn from the vesting clause, which unquestioningly authorizes *vesting* of enemy property. When respondent employs words drawn from the "supervisory" clause, it must be presumed that he is acting under the "supervisory" power and a demonstration that it does not in fact authorize a taking or compulsory transfer proves a lack of authority, not a mere insistence on labels.

6) Respondent rejects our assertion that

> "all transfers of title and possession to the Custodian have been effected by vesting orders",

saying that

> "In a sizeable number of cases the transfer has been accomplished by a 'turn-over directive'" (Br. Opp. 20).

The cases he cites are all instances of "turn-over directives" which direct the delivery of property *earlier vested* by vesting order, as is confirmed by the standard "turn-over directive" attached to our Petition as Appendix C. That standard "form" is addressed to a specific vesting order; it describes the property thereby vested and directs that the "said property" be "turned-over" to the Custodian. "The same procedure", says respondent, "was followed in the instant case" (Br. Opp. 20). Respondent's Directive did not order petitioner to *turn-over* patents already vested; it ordered petitioner *to execute an agreement to assign* the patents.[7] If the patents were already vested by V.O. 18685, it was entirely unnecessary to coerce petitioner to assign them.

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[7] The Directive in suit (App. 200a) enumerates all of the prior vesting orders, which, but for V.O. 18685 (inadvertently overlooked by us), had long before been implemented, and recites a determination that certain patents shall *"be transferred"*—an admission that title thereto had not theretofore been vested or transferred. Thereafter, it states that "the aforesaid determination [that a transfer shall be made] *may be accomplished* by the execution and performance of an *agreement*" (App. 201a) to "assign" said patents and then directs petitioner "to execute" said agreement.

Thus respondent's Directive was not designed to implement a prior vesting order but was an independent invocation of the supervisory power to "compel" execution of an agreement to transfer certain patents and to license others. Were the Directive like his standard "turn-over directive", respondent could have had the far simpler, time-honored suit for enforcement of vesting order and turn-over directive under §17 of the Act instead of a suit for specific performance under an agreement void for duress. In such suit, however, petitioner would have been entitled to call upon respondent for proof that German Schering had *any* "right, title and interest" in the patents. For all that V.O. 18685 took was that "right, title and interest" (App. 137a), and it is settled that a defendant in such enforcement suit is entitled to have the court determine the quantum, if any, of alleged enemy ownership.[8] In fact, Schering A.G. had no "interest" in petitioner's patents as petitioner could have proven had the issue been raised in the district court and, should the point become important, is even now entitled to prove. Vesting Order 18685 was merely a final pre-

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[8] *Kahn* v. *Garvan*, 263 Fed. 909, 912; *Clark* v. *Edmunds*, 73 F.Supp. 390, 393; *McGrath* v. *Ward*, 91 F.Supp. 636, 638.

Respondent suggests that a "turn-over directive" has "the effect of a *res* vesting", i.e. a taking of the entire res rather than the enemy's particular interest therein (Br. Opp. 20). But his standard "turn-over directive" does not attempt to enlarge the scope of the vesting order to which it is addressed; it merely directs a turn-over of the property that "was vested * * * by said vesting order" (App. C. to Pet.). Given the necessity for publication of vesting orders in the Federal Register, quere whether a vesting order can be enlarged by a turn-over directive.

The distinction between a "right, title and interest" vesting and a "res" vesting was noted in *Zittman* v. *McGrath*, 341 U.S. 446, 463-464. In the companion case, *Zittman* v. *McGrath*, 341 U.S. 471, 472, the "turnover directive" described "the specific property which he required to be 'turned over * * *'" and the Court later said that in that case "the *vesting order specifically vested debts* owned to a foreign national * * *", *Brownell* v. *Singer*, 347 U.S. 403, 406-407, i.e. the vesting order itself vested the res or debt, not merely a foreigner's "right, title and interest" therein.

cautionary measure to cut off remotely possible claims of the German parent to its subsidiary's patents, as was done by the parallel vesting of the German parent's possible rights in petitioner's good will, trade-names and trade-marks, which respondent assigned to petitioner for $10 (App. 34a).[9]

7) Respondent also rests his Directive on his "duty to administer" the vested *shares* (Br. Opp. 16). But in "administering" those shares he stood no higher than any other shareholder. *Federal Sugar Refining Co.* v. *United States Sugar Equalization Bd.*, 268 Fed. 575, 584; *Sutherland* v. *Selling*, 16 F.(2d) 865, 868; cf. *Bank of the United States* v. *Planters' Bank*, 9 Wheat. 904, 907-908. New Jersey law, which is controlling, forbids shareholders to constrain the exclusive discretion of the directors (Pet. 11, fn. 10), a limitation which is not obstructive since respondent could have elected directors who shared his views. *Securities & Exchange Comm.* v. *Transamerica Corp.* 67 F.Supp. 326, 330.

IV

The Supervisory Clause Is Unconstitutional Because There Is No Remedy Against a Supervisory Order

The directors had a remedy, respondent first argues, because they could have sued for the "old" patents (which were assigned to him by the coerced Agreement) under §9 of the Act (Br. Opp. 21). But §9 is open only to one claiming an "interest, right or title in" vested property and the directors had no such interest. Elsewhere respondent shows that the interests of the directors "rise no higher than those of the corporation" (Br. Opp.

[9] V.O. 18685 is confined by respondent himself (Br. Opp. 20) to the "old" patents, those originated "prior to April 18, 1942" (id. at 8, fn. 9). Schering A. G. could have no interest in the "new" patents originated after that date when petitioner was under the Custodian's control. For those patents, respondent must invoke a power to order an enemy to transfer his property to third persons rather than to the government (Pet. 10-11), a power never before claimed or exercised, even in the heat of war.

22); an "enemy" corporation is barred from suit by the terms of §9 (cf. Br. Opp. 18). Respecting the "new" patents, which petitioner was directed to license to third persons, respondent argues that no remedy is necessary because the directors have no greater right than the corporation and that it, as an enemy, had no right to sue (Br. Opp. 22). In short, the directors were and are confessedly without a statutory remedy both for the wrong done to themselves and that done to the future shareholders.

Respondent thinks it "obvious" that in order to "compel" corporate action by an "enemy corporation" he "must have the authority to override the discretion of directors" (Br. Opp. 22). It is an authority which he and his predecessors, for upwards of ten years, got along famously without (cf. Pet. 15), and which his power to elect new directors renders superfluous. But assume the need for such *authority*, there must yet be a right to *judicial review* to shield a dissident from unlawful imprisonment or else we are in the realm of Stalin and Beria. An American does not become an outlaw upon becoming a director of a former enemy-owned corporation. Whether respondent's "authority" extends to coercion of an American to act contrary to his conscience and judgment on threat of imprisonment should at least be subject to judicial review. The best respondent can muster is "the classic remedy of a suit for an injunction" to restrain action in "excess of statutory authority" (Br. Opp. 23). He studiously ignores both his own conversion of that remedy to a useless wild-goose chase in the *Land* v. *Dollar* proceedings and this Court's insistence on provision for a statutory suit against the United States where a statute impinges upon fundamental rights (Pet. 18-19).[10]

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[10] Respondent accuses us of conjuring up the "specter" of "unlimited and unreviewable 'freezing' or 'blocking' * * *" (Br. Opp.

V

As a Matter of Equity, Respondent Is Not Entitled to Relief

A "matter of equity" is invoked by respondent to support the judgment below (Br. Opp. 23). He does not controvert that "disclosure" in the prospectus that the corporation had been deprived of its patents presumably did not reach the purchasing investors. Instead he argues that the brokers who bought from him knew, that the purchasers from them are bound by their knowledge (Br. Opp. 24-25) and that the corporation "is bound by the Agreement executed at the behest of its sole stockholder" (id. at 25). What equity is presented by the spectacle of a sole stockholder who first stifles the only free voice—that of the directors—that could be raised on behalf of the future shareholders and then strips the corporation of its patents in contemplation of the sale of its shares, secure in the knowledge that the public was highly unlikely to learn of the "disclosure" that he made to the "brokers" for the sale.[11]

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22). But he himself boasts that on January 29, 1942, the government

> "suspended the then President of Schering and seven other officials and barred them from the premises" (Br. Opp. 4, fn. 4)

a practice in which the government confessedly engaged in "innumerable instances" (Pet. 17). In weighing the actual and "unreviewable" invasion of fundamental rights in this case, this Court may consider that what has gone before is but a prologue to what is to come.

[11] Even where unthinking shareholders have ignored a complete disclosure which *reached them* in the form of proxy statements and approved a rigged deal, a court has set the transaction aside as a betrayal of fiduciary duty owed to stockholders by controlling interests. *Kahn* v. *Schiff*, 105 F.Supp. 973, 976. In essence, respondent would estop the shareholders because he sold his stock to them in reliance on the Agreement, as the district court held (App. 227a-228a). But they cannot be estopped from repudiating an agreement made under his compulsion. *Becker* v. *Miller*, 7 F. (2d) 293, 295; cf. *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F.(2d) 253, 259; *The Arrogante Barcelones*, 7 Wheat. 496, 518.

CONCLUSION

On one theory or another, respondent seeks to foreclose review on the ground that an "enemy" cannot complain of unauthorized action, maintaining, in essence, that the end justifies the means. But administrators must employ the means supplied by Congress. Lawless administrative action against "enemies", if insulated from review today, will encourage administrative lawlessness against Negroes, Japanese or Catholics tomorrow. Recent events have underscored the wisdom of Mr. Justice Douglas' statement that

> "Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York* v. *United States*, 342 U.S. 882, 884 (dissenting opinion).

Respectfully submitted

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